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In the Supreme Court of the United States

OCTOBER TERM, 1961

SAMUEL RAPAPORT AND EDI PENN, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 11-15) is not yet reported.

JURISDICTION

The judgments of the court of appeals were entered on June 5, 1961 (Pet. App. 16-18). The petition for a writ of certiorari was filed on June 29, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a trial for mail fraud and conspiracy to use the mails to defraud, the trial court erred in admitting evidence that one of the petitioners had failed to pay his bills.

STATEMENT

Petitioners were tried before a jury in the United States District Court for the Eastern District of Pennsylvania and were convicted of mail fraud and conspiracy to use the mails to defraud (I-R. 238-244).[1] Petitioner Samuel Rappaport was sentenced to concurrent terms of imprisonment of one year on all twenty-eight counts of the indictment and fined a total of $19,000 (I-R. 249-250). Petitioner Eli Penn was sentenced to concurrent terms of three months on each count and to a total fine of $5,500 (I-R. 253-254). The court of appeals affirmed the conviction of petitioners.[2]

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[1] "I-R." refers to appellants' appendix in the court of appeals. "II-R." refers to appellee's appendix in that court.

[2] The court of appeals reversed the conviction of petitioner Rappaport's wife. Other defendants named in the indictment were: Silvio Petti and Harry Gelman, who pleaded guilty and testified for the government; William Rappaport, as to whom a severance was granted because of his physical condition; Geraldine Penn, whose motion for judgment of acquittal was granted; Sidney Fitch and William Prichitko, as to whom the jury failed to agree; Sandra Petti and Jacqueline Gelman, who were not tried (I-R 7, 2-3).

Count 1 of the indictment charged, in substance, that, from approximately July 1, 1956, to February 19, 1958, petitioners and others had conspired to obtain merchandise from some twenty-eight firms, for which they had not intended to pay (I-R. 7-17). The remaining counts of the indictment alleged substantive offenses of mail fraud. The evidence may be summarized as follows:

On June 16, 1956, petitioner Rappaport and his wife took a lease in the wife's name of business premises at 137 Market Street in Philadelphia (I-R. 19-21, 160), and operated a retail store there under the name of Lynco, registered in the wife's name (I-R. 30, 164).

Early in 1957, petitioner Penn, who was Rappaport's brother-in-law, went into the same type of business. He made two small purchases on credit from two manufacturers who had done business with Rappaport and who extended credit to Penn at Rappaport's request. After the bills were paid, Penn used the two manufacturers as credit references (II-R. 9-12, 14-16). After Penn opened his own establishment, he received numerous shipments of merchandise which were never paid for (see I-R. 73-145).

During the summer and fall of 1957, Penn received quantities of merchandise which were sometimes so large that they had to be stored on the sidewalk. Either Penn or Rappaport would then remove the names of the manufacturers from the cartons and deliver the merchandise after business hours to Lynco (I-R. 50-59, 62-67; II-R. 89, 93).

In August, Rappaport approached Petti, who had been with the company as a truck driver, and offered to set him up in business in Camden, New Jersey (II-R. 128-130). Petti accepted the offer and Rappaport set up the business at his own expense (II-R. 130-133). At the new business establishment, Penn would come to give instructions to Petti; at the direction of Rappaport, however, Penn kept out of sight of customers (II-R. 135). Using assumed names, Penn rented several other business premises and identified them with different fictitious names for the sole purpose of receiving mail (II-R. 138-145, 19-20, 22-26, 27-28, 30, 32, 34, 36-37, 40-41, 46-47, 49). None of these names was registered under the fictitious names statute (II-R. 2-7).[3]

Rappaport made a similar arrangement with co-defendant Gelman, setting him up in business in Philadelphia in September 1957 (II-R. 74-79). He was instructed to make up purchase orders, giving as credit references the fictitious places of business previously opened up by Penn (II-R. 80-84). The merchandise Gelman received on the orders went to Lynco (II-R. 91).

Both Petti and Gelman prepared a large number of purchase orders. The firms receiving the orders would direct inquiries to the fictitious credit references. The conspirators would pick up these inquiries and mail favorable replies, following which the goods

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[3] Penn was also active at Lynco during this later period, taking charge at times when Rappaport was absent (II-R. 193-195).

would be delivered to Petti or Gelman, who would then transfer them to Lynco. Rappaport told both Gelman and Petti that payment for the merchandise would be made at the end of the year (II-R. 112, 150), but none of the co-conspirators ever paid for the merchandise. (II-R. 50-73, 95, 101, 102-103, 121-127, 156-168, 171-173, 188-192, 205-212.)

ARGUMENT

The sole contention raised by petitioners is that it was error to permit the introduction of evidence that Penn failed to pay the bills incurred at his own place of business. The court of appeals, evidently believing that this evidence did not relate to the conspiracy charged, disposed of the contention on the ground that the evidence of past business conduct was harmless in view of the strong direct evidence of wrongdoing and the implausibility of the defense offered (Pet. App. 14).

We believe that the evidence was properly admitted in the first place. The indictment, which dated the conspiracy from July 1956, charged (I-R. 12) not only that:

> [i]t was the plan and purpose of the conspiracy to furnish false, fraudulent and fictitious references to the victims hereinabove named, for the purpose of inducing the victims to part with their property and merchandise, in the expectation that an agreed price would be paid for the same, which expectation was induced by the Defendants.

but also that:

> [i]t was * * * an essential plan and purpose of the conspiracy to distribute the property and merchandise which was received from the victims, and to sell, conceal and dispose of said property and merchandise, and to convert the proceeds received therefor, for the use and benefit of the Defendants, without paying or without causing to be paid to the said victims, the agreed price for the said property and merchandise so converted.

In other words, although the conspiracy was directed to the obtaining of merchandise by false credit references, a part of that conspiracy was for the conspirators to derive benefit from the merchandise by not paying for it. In carrying out the earlier portion of the scheme, as the district court pointed out (I-R. 108), Penn found it unnecessary to give fictitious credit references in order to obtain the merchandise. Rather, the scheme in its earlier stage was for Penn to obtain credit, pay his bills for small purchases and then use the creditors as references for subsequent transactions with respect to which Penn's intention was not to pay. This intention was fairly inferable from the fact that, after Rappaport assisted Penn in starting the business, both would transfer the merchandise to Lynco in a clandestine manner, after the labels from the merchandise had been removed. The intention was also inferable from evidence that Penn in fact did not pay his bills for subsequent transactions (see the Statement, p. 3). Since then this portion of the conspiracy was not

essentially different from the subsequent portion with respect to which completely false references were used, evidence which showed that Penn had failed to pay his bills for his later transactions was directly relevant, and its admission was not erroneous.

In any event, as the court of appeals held, there was no prejudice to petitioners by admission of this testimony. The fraudulent conduct of petitioners in negotiating leases for wholly imaginary companies for the purpose of furnishing fictitious references for the businesses set up ostensibly by Petti and Gelman was proved directly. Thus, even if the admissibility of the evidence of Penn's earlier conduct had been questionable, which we deny, the exclusion of this evidence would not have affected the verdict of the jury. Cf. *Kotteakos* v. *United States*, 328 U.S. 750, 764.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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